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In the Supreme Court of the United States

October Term, 1956

[illegible]

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [illegible]

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 107

FRANK MALFI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-17) is reported at 264 F. 2d 147.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1959 (Pet. App. 18). A petition for rehearing was denied on May 12, 1959 (Pet. App. 19). The petition for a writ of certiorari was filed on June 10, 1959. The judisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had possession of narcotics so that a presumption of guilt for illegal dealing in such

narcotics arose under 21 U.S.C. 174, where strong circumstantial evidence disclosed that he had unexplained dominion and control over the narcotics and aided and abetted a co-defendant in their sale.

2. Whether part of a charge not objected to, in which the court read provisions of the aider and abettor statute (18 U.S.C. 2) and explained its meaning, was proper although not expressly limited to the substantive counts involving narcotics sales, and where a conspiracy count was covered later in the charge.

STATUTES INVOLVED

21 U.S.C. (1952 ed., Supp. V) 174, 70 Stat. 570, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954.

26 U.S.C. (1952 ed., Supp. V) 4705(a), 68A Stat. 551, provides:

Order Forms.

(a) General Requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Secretary or his delegate.

18 U.S.C. 2 provides:

Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Petitioner was charged, together with defendant Santore, in a 5-count indictment in the United States District Court for the District of New Jersey. Counts I and III charged the illegal receipt and sale of certain quantities of heroin in violation of 21 U.S.C. 174 (*supra*, p. 2) on July 25, 1957 and August 22, 1957 (R. 2, 3). Counts II and IV charged illegal sales of this heroin without written order forms in violation of 26 U.S.C. 4705(a) (*supra*, p. 3) on the same dates (R. 2, 3). Count V was a conspiracy count (R. 3-5). The defendants were found guilty on all counts, and petitioner was sentenced to 15 years' imprisonment on the first four counts and five years on the conspiracy count, the sentences to run concurrently (R. 58, 59). On appeal, in which conviction on the conspiracy count was not challenged, conviction on the other counts was unanimously affirmed (R. 1; Pet. App. 9-18).

The evidence adduced at the trial may be summarized as follows:

Subsequent to previous negotiations with defendant Santore, narcotics agents Picini and Marshall met with him at a delicatessen in Philadelphia on July 18, 1957 (R. 6, 7). Santore informed the agents that he had made arrangements for them to meet his "connection" and asked for, and received, an advance of $300 (R. 7). On July 23, Santore introduced the agents to petitioner, who stated that he had discussed with Santore the fact that the agents wanted to purchase some uncut heroin. Petitioner announced that "he had made arrangements with his connection, and had been advised that he could obtain uncut heroin", provided the

"money would have to be paid in advance". Petitioner stated that he would not personally deliver the drugs, but that delivery would be made by Santore (R. 8, 19, 27).

On the night of July 24, agents Picini and Marshall met petitioner and Santore in Philadelphia and paid petitioner $3,000 in advance for a half kilo of heroin, which petitioner said would be delivered by Santore at the King Cole Motel near Williamstown, New Jersey (R. 9-10, 27-28). On July 25, Santore delivered to the agents a package containing 10 ounces, 6½ grains of heroin and was paid an additional $200. This purchase was made without a written order form (R. 10, 16, 28-29). On July 29, agent Picini paid petitioner an additional $750, when informed that Santore had delivered a larger amount of heroin than he thought he was delivering (R. 11, 29).

After further negotiations, on August 13, 1957 the agents paid petitioner $3,100 as an advance on an agreed $5,100 price for another half kilo of heroin, which was to be delivered in a few days (R.12). On August 21, the agents went to petitioner's home and demanded either delivery of the heroin or return of their money. Petitioner told them that the "money was already in the hands of the connection, that he was going up that night to make sure that the heroin would be delivered either late that night or the next day"; that "as soon as he got the heroin he would deliver it to Santore, and Santore would deliver it" to them; and that they should remain at the motel, where Santore would contact them (R. 12-13). On the morning of August 22, Santore delivered to the agents at the motel 17 ounces, 153½ grains of heroin.

The agents paid Santore $2,250 at that time, and $300 more on August 26 (R. 13, 17, 30). There was no written order form for the heroin sale on August 22 (R. 13, 31).

On cross-examination, the agents testified that petitioner did not make any heroin deliveries in New Jersey, and that his fingerprints were not discovered on the packages in which the deliveries were made (R. 23, 32).

In its charge to the jury, after quoting constitutional and statutory provisions regarding venue, the court stated as follows (R. 48):

> Congress has, likewise, seen fit, as is its power, to prescribe the status of those alleged to have been associated with others in the commission of crime in the following language: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal." "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Petitioner made no objection to this part of the charge. The court then went on to state that the crimes charged were two alleged sales of narcotics in New Jersey on July 25 and August 22, 1957, and gave legal definitions as to what constitutes a sale and the passing of title (R. 48-49). The charge then continued (R. 49):

> In reference to the charge in this particular case, if you would find that the article in question was contraband, it would hardly be possible to effect the passing of legal title, so that in the main,

you will concern yourself, as far as sale is concerned, with the passing of possession.

You will, therefore, inquire into all the evidence and determine whether under all the terms and conditions surrounding this transaction, the defendants completed their acts in Philadelphia, Pennsylvania. If so, then this court would not have jurisdiction, and your verdict would have to be one of not guilty. If, on the other hand, you find from all the evidence that such sale was not completed in Philadelphia, Pennsylvania but that the defendants participating in such sale had terms and conditions thereof calling for delivery of the narcotics in question in New Jersey, and that such sale would not be complete until possession was delivered to the agents at the King Cole Motel in Williamstown, New Jersey, and that thereafter such possession was, in fact, delivered to the agents in Williamstown, New Jersey, then this court would have jurisdiction.

ARGUMENT

Any one of the four substantive counts on which petitioner was convicted will support the sentence imposed. Petitioner therefore necessarily attempts to challenge his convictions under both 21 U.S.C. 174 and 26 U.S.C. 4705(a). Neither of his contentions has merit.

1. Petitioner contends that, since there was no direct proof of his possession of the narcotics, the government cannot make use of the presumption under 21 U.S.C. 174 (*supra*, p. 3) as proof that the narcotics were imported or that petitioner knew they had been imported contrary to law (Pet. 6-7).

Evidence as to an accused's possession of narcotics need not, however, be direct in order to give rise to the statutory presumption of guilt under 21 U.S.C. 174; such evidence may be circumstantial. *United States* v. *Pisano*, 193 F. 2d 355, 360 (C.A. 7); *United States* v. *Pinna*, 229 F. 2d 216, 218 (C.A. 7). Here, there was strong and cogent circumstantial evidence that petitioner did have possession of the narcotics which would bring the statutory presumption into play. In regard to the sale on July 25, 1957, in the preliminary conference with the agents on July 23, petitioner stated that he had made arrangements with his connection and could obtain uncut heroin if payment were made in advance. Following advance payment to petitioner on July 24, Santore made delivery the following day (*supra*, pp. 4, 5). With respect to the sale on August 22, the agents paid petitioner $3,100 in advance on August 13, and on August 21 they complained about delay in delivery. Petitioner replied that "he was going up that night to make sure that the heroin would be delivered either late that night or the next day," and that "as soon as he got the heroin he would deliver it to Santore, and Santore would deliver it" to the agents. Santore did make delivery on August 22 in accordance with petitioner's promise (*supra*, pp. 5, 6). Under this evidence, a "member of the jury who was not by such evidence convinced beyond a reasonable doubt that it was [the accused] who had sold the heroin for the money he received would have been naive indeed." *United States* v. *LaRocca*, 224 F. 2d 859, 860 (C.A. 2).

Although stating that he is aware of the aider and abettor statute (18 U.S.C. 2, *supra*, p. 3), petitioner really seeks to ignore its application altogether.

Although petitioner was extremely cautious in not physically making delivery of the heroin but leaving that to his co-defendant Santore, petitioner was the principal actor in the transactions. He had such control, dominion, and power of disposal over the narcotics as to constitute possession. Cf. *Brown* v. *United States*, 222 F. 2d 293, 297 (C.A. 9); *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U.S. 584. At the least, he aided and abetted Santore so that Santore's possession of the narcotics was possession by petitioner as well. See the analogous case of *United States* v. *Maroy*, 248 F. 2d 663, 666 (C.A. 7), certiorari denied, 355 U.S. 931. See also *United States* v. *Chiarelli*, 192 F. 2d 528, 531 (C.A. 7), certiorari denied, 342 U.S. 913; *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811; *Alexander* v. *United States*, 241 F. 2d 351, 355, 356 (C.A. 8), certiorari denied, 354 U.S. 940.

There is no conflict in decisions as asserted by petitioner (Pet. 6). *Harris* v. *United States*, 359 U.S. 19, does not hold that it is necessary to prove possession of the narcotics by direct—as opposed to circumstantial—evidence to take advantage of the presumption under 21 U.S.C. 174, even though in *Harris* there was direct evidence of possession. The passage petitioner quotes is merely an observation as to the difference in proof required for the presumptions under 21 U.S.C. 174 and 26 U.S.C. 4704(a), to show that the offenses were separate and that consecutive sentences could be imposed on each count. In *United States* v. *Landry*, 257 F. 2d 425, 431 (C.A. 7), the court expressly recognized that the "fact of possession may be shown by circumstantial proof," but found that, unlike the situation in the

instant case, the undisputed proof showed possession in a person other than the defendant and rejected the government's argument that ownership of narcotics was proof of possession. And, unlike the instant case where petitioner by reason of his dominion and control over the narcotics had possession, in *Jackson v. United States*, 250 F. 2d 772 (C.A.D.C.), the defendant had no semblance of possession but only a key to his nephew's room and there was no proof that he knew that narcotics were hidden in the room.

2. Neither is there merit to petitioner's belated contention that there was fundamental error when the court merely read to the jury provisions of the aider and abettor statute, 18 U.S.C. 2 (see the Statement, supra, p. 6), without explaining its meaning and without limiting it to counts II and IV, which charged illegal sales of narcotics in violation of 26 U.S.C. 4705(a) (Pet. 7-8). Petitioner did not object to the charge as given,[1] and did not include the matter now urged, either in his requests to charge, or in the renewal of his motion for judgment of acquittal and an alternative motion for a new trial (see R. 38-39, 55-58).

The provisions of 18 U.S.C. 2 appeared in the charge in a context relating to the venue of the substantive charges regarding the two sales under the first four counts of the indictment (R. 48-49). There is no reasonable basis for speculating that the jury would confuse these provisions with the conspiracy instructions relating to count V, which

[1] Rule 30, F. R. Crim. P., provides: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

appeared considerably later in the charge (R. 52-55), after intervening instructions on the subject of entrapment (R. 50-52). When the provisions of 18 U.S.C. 2, which are couched in relatively simple and understandable language, were read almost verbatim[2] to the jury, the court prefaced this with the statement that Congress had seen fit "to prescribe the status of those alleged to have been associated with others in the commission of crime in the following language" (R. 48). Thus, the court did more than just read the statute[3]; it explained it in language intelligible to jurors and consistent with a previous pronouncement by this Court as to what conduct constitutes aiding and abetting under the statute. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619; and see *Pereira* v. *United States*, 347 U.S. 1, 9-11. Under the compelling evidence as to petitioner's participation in the two narcotics sales involved in the first four counts (*supra*, pp. 4-6), the jury could find, without confusion and without being misled, that petitioner had associated with, aided and abetted, and caused Santore to make the illicit drug sales so that petitioner was guilty under the substantive counts as a principal.

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[2] Although the court, presumably inadvertently, omitted "wilfully" from a reading of clause (b) of 18 U.S.C. 2, at the close of its charge the court did give petitioner's request No. 4 reading, "You must acquit [petitioner] if you find that he did not wilfully and knowingly intend to violate the law" (R. 56).

[3] It has even been held in a narcotics sale conviction, similar to that involved here, that a verbatim quotation of the aider and abettor statute was not objectionable, where there was evidence (as there is here) that the accused had aided and abetted in the transaction. *United States* v. *Maroy*, 248 F. 2d 663, 666 (C.A. 7), certiorari denied, 355 U.S. 931.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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